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In the Supreme Court of the United [redacted]

[redacted]

No. 570 Misc.

[redacted]

FRANK J. SEXTON,
JAMES F. SEXTON,

Petitioners,

vs.

THE STATE OF OHIO,
THE SUPREME COURT OF THE STATE OF OHIO,
CARL V. WEYGANDT,
Chief Justice, Supreme Court of the State of Ohio,
KINGSLEY A. TAFT,
Judge, Supreme Court of the State of Ohio,
JOHN M. MATTHIAS,
Judge, Supreme Court of the State of Ohio,
CHARLES B. ZIMMERMAN,
Judge, Supreme Court of the State of Ohio,
JAMES G. STEWART,
Judge, Supreme Court of the State of Ohio,
JAMES F. BELL,
Judge, Supreme Court of the State of Ohio,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION.

FRANK J. SEXTON,
30045 Euclid Ave., Wickliffe, Ohio,
JAMES F. SEXTON,
852 Beverly Road, Cleveland Heights 21, Ohio,
In Persona Propria.

TABLE OF CONTENTS.

Motion for Leave to File Petition for Writ of Mandamus 1

Petition for a Writ of Mandamus to the Supreme Court of the State of Ohio and the Honorables Carl V. Weygandt, Kingsley A. Taft, John M. Matthias, Charles B. Zimmerman, James G. Stewart, and James F. Bell, Judges, the Supreme Court of the State of Ohio 3

Opinions Below 4

Jurisdiction 4

Questions Presented 4

Statutes Involved 5

Statement of the Case 5

Reasons for Allowing the Writ 9

Appendix A. Letter of Feb. 10, 1958, James F. Sexton to Judges, Supreme Court of Ohio 12

TABLE OF AUTHORITIES.

Cases.

DeRan v. Kilits, 8 F. 2d 840 (C. A. 6, 1925) 9

Murchison, In Re, 349 U. S. 133 (1955) 9

Sexton v. Barry, 163 Ohio St. 124, cert. denied 350 U. S. 838 7-8

Sexton v. Barry et al., 233 F. 2d 220, cert. denied 352 U. S. 870 (1956) 8, 9, 10

State ex rel. Wanamaker, Judge v. Miller, 164 Ohio St. 174 4

State ex rel. Wanamaker, Judge v. Miller, Clerk, 164 Ohio St. 176 4

Tumey v. Ohio, 273 U. S. 510 (1920) 9

Constitution.

Fourteenth Amendment to the Constitution of the United States ---------- 5

Statute.

28 U. S. C. Section 1651(a) ---------- 4

In the Supreme Court of the United States

OCTOBER TERM, 1927.

No. ..... Misc.

FRANK J. SEXTON,
JAMES F. SEXTON,
Petitioners,

vs.

THE STATE OF OHIO,
THE SUPREME COURT OF THE STATE OF OHIO,
CARL V. WEYGANDT,
Chief Justice, Supreme Court of the State of Ohio,
KINGSLEY A. TAFT,
Judge, Supreme Court of the State of Ohio,
JOHN M. MATTHIAS,
Judge, Supreme Court of the State of Ohio,
CHARLES B. ZIMMERMAN,
Judge, Supreme Court of the State of Ohio,
JAMES G. STEWART,
Judge, Supreme Court of the State of Ohio,
JAMES F. BELL,
Judge, Supreme Court of the State of Ohio,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

The petitioners move the Court for leave to file the petition for a writ of mandamus hereto annexed; and further move that an order and rule be entered and issued directing the Honorable The Supreme Court of Ohio and

the Honorables Carl V. Weygandt, Kingsley A. Taft, John M. Matthias, Charles B. Zimmerman, James G. Stewart and James F. Bell, Judges, The Supreme Court of Ohio, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioners should not have such other and further relief in the premises as may be just and meet.

JAMES F. SEXTON,
FRANK J. SEXTON,
Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1937.

No. ..... Misc.

FRANK J. SEXTON,
JAMES F. SEXTON,

Petitioners,

vs.

THE STATE OF OHIO,
THE SUPREME COURT OF THE STATE OF OHIO,
CARL V. WEYGANDT,
Chief Justice, Supreme Court of the State of Ohio,
KINGSLEY A. TAFT,
Judge, Supreme Court of the State of Ohio,
JOHN M. MATTHIAS,
Judge, Supreme Court of the State of Ohio,
CHARLES B. ZIMMERMAN,
Judge, Supreme Court of the State of Ohio,
JAMES G. STEWART,
Judge, Supreme Court of the State of Ohio,
JAMES F. BELL,
Judge, Supreme Court of the State of Ohio,

Respondents.

PETITION FOR A WRIT OF MANDAMUS TO THE SUPREME COURT OF THE STATE OF OHIO AND THE HONORABLES CARL V. WEYGANDT, KINGSLEY A. TAFT, JOHN M. MATTHIAS, CHARLES B. ZIMMERMAN, JAMES G. STEWART, AND JAMES F. BELL, JUDGES, THE SUPREME COURT OF THE STATE OF OHIO.

Petitioners pray that a writ of mandamus issue to review the judgments, decisions and actions of the Su-

preme Court of the State of Ohio, requesting demand for the individual Judges, made parties hereto, to withdraw from participation in proceedings identified on the docket of said Supreme Court of the State of Ohio as In re Estate and Trust of Patrick Sexton, Deceased, Case No. 35487, and affidavit of prejudice against said Judges, made parties hereto, forwarded to said Supreme Court of the State for filing, said demand having been mailed to each of said Judges on February 10, 1958 and said Affidavit of Prejudice having been forwarded to said Supreme Court of the State of Ohio on February 19, 1958.

OPINIONS BELOW.

There are no opinions below to this time.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1651(a).

QUESTIONS PRESENTED.

1. Whether six Judges of the Supreme Court of the State of Ohio, upon demand presented to them by registered mail, return receipt requested, have the right further to participate in proceedings pending in their Court and designated on the docket of their Court as In re Estate and Trusteeship of Patrick Sexton, Deceased, where the demand is predicated upon the bias and prejudice of said Judges against these petitioners, and the statutory right to file affidavits of prejudice against said Judges is in doubt,[1] thereby denying these petitioners an adequate

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[1] See *State ex rel. Wanamaker, Judge v. Miller, Clerk*, 164 Ohio St. 176, and related case, *State ex rel. Wanamaker, Judge v. Miller*, 164 Ohio St. 174.

remedy at law to have the constitutional issue reviewed to this Court through the normal certiorari procedure to this Court.

2. Whether upon such demand and failure of such Judges to remove themselves from the cause, the petitioners have the right to file affidavits of prejudice in the Supreme Court of the State of Ohio, directed against said Judges, thereby to accord these petitioners an adequate remedy through the normal certiorari procedure to this Court.

3. Whether upon presentation of the affidavit of prejudice to the Clerk of the Supreme Court of the State of Ohio, by registered mail, return receipt, and directed against said Judges, parties hereto, the said Judges in view of demand made upon them have any right to participate further in the proceedings then pending before them as Judges of said Supreme Court of Ohio.

STATUTES INVOLVED.

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States of America, guaranteeing an impartial court to a litigant at every stage of a judicial proceeding through the Courts of a State.

STATEMENT OF THE CASE.

1. The petitioners are citizens and residents of the United States of America. The petitioner, Frank J. Sexton, is the applicant in a case now pending before the Supreme Court of the State of Ohio, and identified in the records of said Court as Case No. 35487, In re Estate and Trusteeship of Patrick Sexton, deceased, seeking to be appointed a trustee (successor) in the said estate and trust. Both

petitioners are parties who will be bound by the judgment of the Supreme Court of the State of Ohio in those proceedings.

2. The petitioner, James F. Sexton, as counsel in the cause pending in the Supreme Court of the State of Ohio made demand upon each of the Judge respondents to withdraw from all further participation in the case now pending before said Ohio Supreme Court. The demand is predicated upon the bias and prejudice of said Judges against these petitioners, individually. A copy of the demands is attached hereto, in respect to which see Appendix A. The demands were mailed to each of the Judge respondents by registered mail, return receipt, on February 10, 1958. To date there has been no reply by said Judge respondents indicating a compliance with the demand made upon each of them.

3. The claim of bias and prejudice against said Judge respondents stems from their conduct in a prior proceeding involving the said estate and trust.

4. In the prior proceeding, the petitioner, James F. Sexton, filed originally in the estate of Patrick Sexton, deceased, a discovery action in the Probate Court of Lake County, Ohio, seeking to effect a recovery of assets from one Eleanore M. Barry.

5. The judgment of the Probate Court in the prior proceeding denied jurisdiction to hear the discovery proceedings. The Court of Appeals, Seventh Judicial District, Ohio, reversed the judgment of the Probate Court.

6. After the reversal by the Court of Appeals, the petitioner, Frank J. Sexton, filed an application to be appointed a successor trustee in the estate and trust. In disregard of the Mandate of the Court of Appeals, the Probate

Judge (the same Judge who decided the discovery proceeding) dismissed the trustee application. This Probate Judge has since resigned from all further participation in the cause. His resignation was entered on the ground of prejudice on his part.

7. During the pendency of the trustee application, the discovery proceedings were appealed by the said Eleanore M. Barry to the Ohio Supreme Court. The Ohio Supreme Court allowed a motion to certify in the discovery proceedings, whereupon action was instituted against the Ohio Supreme Court in the United States District Court at Cleveland, Ohio, seeking to restrain the Ohio Supreme Court from deciding the discovery proceedings.

8. During pendency of the District Court suit to which the Ohio Supreme Court was a party, and of which the Ohio Supreme Court had notice through service of process, the Ohio Supreme Court entered decision in the discovery proceedings in a manner adverse to the interests of the said estate and trust and of the petitioners herein. Prior to such decision, application for continuance of the discovery proceedings had been made to the Ohio Supreme Court, which application sought continuance of the discovery proceedings in the Ohio Supreme Court pending decision from all appeals in the District Court suit. This application for continuance was never filed by said Ohio Supreme Court, even though it had been sent registered mail, return receipt. Nor was the decision of said Court entered in the journals or records of said Court in the prior discovery proceedings.

9. Both the discovery proceedings and the injunction action were brought to this Court on certiorari. This Court denied certiorari in both cases. See *Sexton v. Barry*,

350 U. S. 838; and *Sexton v. Barry et al.*, 352 U. S. 870. The opinions in both cases are reported below at 163 Ohio St. 124 and 233 F. 2d 220. The failure of said Ohio Supreme Court to file or record decision on said application for continuance was prejudicial to the interest of said estate and trust and these petitioners. Each of said Judge respondents was on notice as to this prejudice through "objections" filed in the Ohio Supreme Court in the prior proceedings. Also each of said Judge respondents were on notice of the complaint filed in the District Court through the Ohio Supreme Court's having been a party and served with process in said District Court suit.

10. The decision by said Judge respondents in the prior discovery proceedings was such that the decision was designed to establish a defense by said Judges in the federal injunction action. The decision also was such that it evidenced a complete bias and prejudice on the part of said Judge respondents against the entire interests of the said estate and trust and of these petitioners.

11. The petitioners further claim that the decision of said Judge respondents in the prior discovery proceedings was so in disregard of Ohio law and the facts in the 754 page Bill of Exceptions on file in the cause as to constitute substantial evidence of the bias and prejudice of said Judge respondents against the interests of the said estate and trust and of these petitioners, especially in the background of the federal injunction action. These matters, *inter alia*, were set forth in the affidavit of prejudice forwarded to the Clerk of the Ohio Supreme Court for filing in that Court. The affidavit of prejudice was directed against each of the Judge respondents and was forwarded to the Clerk of the Supreme Court of the State of Ohio on February 19, 1958. The petitioners to the date of preparation of this

petition have not been advised as to the filing of said affidavit by said Clerk and have reason to believe that the affidavit will not be filed. The petitioners, therefore, say on information and belief that it will not be filed.

12. The petitioners have no adequate remedy at law. The hearing on the trustee application has been set for hearing on February 27, 1958. The conduct of said Judge respondents is not and cannot properly be made a matter of record subject to judicial review in this Court in the ordinary course of appeal on the trustee application and this will be particularly true in the event said Clerk of the Ohio Supreme Court fails to file the affidavit of prejudice.

REASONS FOR ALLOWING THE WRIT.

The reasons for allowing the writ may be summarized by citation of four cases, as follows:

Tumey v. Ohio, 273 U. S. 510 (1920);
In Re Murchison, 349 U. S. 133 (1955);
Sexton v. Barry et al., 233 F. 2d 220, cert. denied 352 U. S. 870 (1956);
De Ran v. Kilits, 8 F. 2d 840 (C. A. 6, 1925).

The importance of this cause from the standpoint of this Court's jurisdiction lies in the fact that in the absence of the right to file an affidavit of prejudice in the Ohio Supreme Court, or otherwise to have prejudice determinations made a matter of record in the cause now pending before it, the jurisdiction of this Court properly to review the constitutional issues on certiorari or appeal in the cause to this Court is completely defeated. As a consequence, the issuance of an extraordinary writ becomes the only remedy available for these petitioners to secure due process or equal protection in the Courts of a State and at

the same time have a proper review of the constitutional issues by this Court. The cause, therefore, presents special reason for allowance of the extraordinary writ of mandamus which is sought herein.

That these petitioners are entitled to a hearing before an impartial court is in these United States beyond even the realm of argument. That these petitioners view six Judges in the Ohio Supreme Court as not being within the category of impartial Judges has been made an issue (1) by demand mailed registered, return receipt, on February 10, 1958, to each of the six Judge respondents requesting that they withdraw from the proceedings on the ground of their being biased and prejudiced against these petitioners, the estate and trust involved; (2) by forwarding of an affidavit of prejudice directed against said six Judge respondents to the Clerk of the Ohio Supreme Court on February 19, 1958, by registered mail, return receipt, to be filed in said Court; and (3) by these Mandamus proceedings.

In the event that said Judge respondents have the effrontery to proceed to participate in the hearing set before them on February 27, 1958, or for that matter in any other hearing in these proceedings, several points become immediately apparent. The affidavit of prejudice directed against said six Judge respondents has been filed in their Court and said Judges have not conformed to the usual practice laid down in *Sexton v. Barry*, 233 F. 2d 220, cert. denied 352 U. S. 870 (1956) by voluntarily entering their withdrawal from the case. In that event, these petitioners respectfully submit that this Court should proceed to determine exactly why different procedures should be followed in respect to the same litigants. Otherwise, the affidavit of prejudice has not been filed, the demand made upon said Judge respondents takes effect and,

the petitioners respectfully submit, this United States Supreme Court in aid of its appellate jurisdiction should proceed to hearing on the matter of prejudice.

In this respect, it may be mentioned also that the cause takes a special light in view of the fact that the Probate Judge originally hearing the cause in the Probate Court tendered shortly after hearing on the trustee application his resignation from the cause assigning the ground of prejudice as being the reason for his withdrawal.

WHEREFORE, the petitioners pray:

1. That a writ of mandamus issue from this Court directed to the Honorable Supreme Court of the State of Ohio and the Honorables Carl V. Weygandt, Kingsley A. Taft, John M. Matthias, Charles B. Zimmerman, James G. Stewart and James F. Bell, Judges of said Court, requiring said Honorable Judges to show cause on a day to be fixed by this Court directing said Honorable Judges each to enter his withdrawal from all further participation in the case now pending in the Supreme Court of Ohio and designated in the records of the Court as Case No. 35487, In re Estate and Trusteeship of Patrick Sexton, Deceased, and also from all matters related thereto which henceforth may come before the Court;

2. The petitioners have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

FRANK J. SEXTON,
JAMES F. SEXTON,
Petitioners.

APPENDIX A.*

852 Beverly Road
Cleveland Heights 21, Ohio
February 10, 1958

The Honorable Kingsley A. Taft
The Honorable John H. Matthias
The Honorable Charles B. Zimmerman
The Honorable James G. Stewart
The Honorable James F. Bell
Judges, Supreme Court of Ohio
The Supreme Court of Ohio
Columbus, Ohio

Dear Honorable Judges:

Please consider this letter by the copy mailed to you a formal demand upon each of you to enter your withdrawal from all further participation in the case now pending in the Supreme Court of Ohio and designated in the records of the Court as Case No. 35487, In re Estate and Trusteeship of Patrick Sexton, Deceased, and also from all matters related thereto which henceforth may come before the Court.

It is the considered opinion of both Mr. Frank J. Sexton, the applicant therein, and myself as a party in the proceeding that each of you have not been an impartial Judge in other matters related to the instant cause in which you previously had participated. It is further our opinion that there was and will continue to be bias and prejudice on your part against us in this estate and trust and that you will not be impartial Judges in the case presently pending before the Court.

This demand is made for purposes of any and all judicial review which may be necessary in the United States Supreme Court. A copy of this letter is being forwarded, registered, return receipt, for notice and service purposes to Mr. Wm. M. Hubbard as attorney for Mrs.

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* Similar demand by separate letter was made upon The Honorable Carl V. Weygandt, Chief Justice.

Barry who is the opponent-appellee. Also, demand of similar nature is being made by separate letter upon the Honorable Chief Justice.

Yours very respectfully,

JAMES F. SEXTON.

Registered—Return Receipt Requested

cc: Mr. Wm. M. Hubbard
and Miss Irene A. Lennon,
c/o Mr. Wm. M. Hubbard
174 Main Street
Painesville, Ohio